Antah Schindler Sdn Bhd v Ssangyong Engineering & Construction Co Ltd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02–474 OF 2003

MOKHTAR SIDIN, SURIYADI AND ZAINUN ALI JJCA

3 MARCH 2008

Civil Procedure — Judgments and orders — Order made by court — Conditional terms in the order — Plaintiff never sought any direction on 'pay when paid' clause — Whether court laid down unnecessary terms

Contract — Agreement — Mode of payment — Main contract and subcontract — 'Pay when paid' clause — Whether clause prevented plaintiff from pursuing claim against defendant

The plaintiff/appellant was a subcontractor whilst the defendant/respondent was the main contractor, appointed by the employer to install lifts in respect of a project. The plaintiff then had dutifully carried out its part of the bargain. The plaintiff submitted that the contractor should apply for the architect's certificates and payments made from those certificates, which inevitably represented the total value of work done by the plaintiff, to be paid forthwith within 14 days pursuant to cl 11(b) of the subcontract agreement. However the defendant contended that, the main contract with the employer was also incorporated in the contractual relationship between the plaintiff and defendant. Thus it was mutually agreed and understood that payments to the plaintiff would be made after the defendant had received payments from the employer. As such, in the event payments were not received from the employer, the defendant would not be obliged to make payment to the plaintiff. In other words, the subcontract had proceeded on a 'pay when paid' basis. The plaintiff alleged that the denial of the express provision of cl 11(b) of the subcontract was repugnant to or inconsistent with their agreement. The senior assistant registrar refused the plaintiff's application under O 14 of the Rules of the High Court 1980 on the premis that it was not such a straight forward case, leading subsequently to a successful appeal before the judge in chambers. However, the High Court judge had made an order, which had dissatisfied the successful plaintiff, in that it contained conditional terms within it.

Held, allowing the appeal with costs here and below:

(1) The issue of 'pay when paid' as being triable was a non-starter as there was sufficient evidence in the circumstances of the case to confirm the requirement. By the very language alluded to in the relevant provisions of the current main contract and subcontract, read together with cl 27(a)(vii), the court construed the clause as a mere provision imposing a time limit for payment, ie 14 days. There was no express provision mounted into it which imposed any restriction over the rights of the plaintiff to pursue its claim against the defendant (see para 15).

(2) Since it was not unambiguously expressed in cl 27(a)(vii) that the plaintiff was to be denied its rights from pursuing the claim in the current format, the action was procedurally correct (see para 16).

(3) The instant case was straight forward and simple in that the salient terms of the written contract had been agreed upon by both parties and the history of payments showed that the parties had acceded to the mode of payment. On the other hand, on account of there being no bar preventing it the plaintiff was not disallowed from pursuing the claim (see para 17).

[Bahasa Malaysia summary

Plaintif/perayu adalah subkontraktor sementara defendan/responden adalah kontraktor utama yang dilantik oleh majikan untuk memasang lif berhubungan dengan satu projek. Plaintif telah memenuhi tugasnya. Plaintif berhujah bahawa kontraktor sepatutnya memohon sijil arkitek dan bayaran yang dibuat menurut sijil-sijil tersebut, yang mewakili jumlah nilai kerja yang dilakukan oleh plaintif, hendaklah dibayar dalam masa 14 hari mengikut klausa 11(b) perjanjian subkontrak tersebut. Walau bagaimanapun defendan menghujah bahawa kontrak utama dengan majikan juga dimasukkan ke dalam kontrak di antara plaintif dan defendan. Ia telah dipersetujui dan difahami bersama bahawa bayaran-bayaran kepada plaintif akan dibuat selepas defendan menerima bayaran-bayaran daripada majikan. Oleh itu, sekiranya bayaran tidak diterima daripada majikan, defendan tidak perlu membuat bayaran kepada plaintif. Dalam kata lain, subkontrak telah berjalan atas dasar 'bayar apabila dibayar'. Plaintif mendakwa penafian peruntukan nyata klausa 11(b) subkontrak adalah bertentangan dengan atau tidak konsisten dengan perjanjian mereka. Penolong kanan pendaftar telah menolak permohonan plaintif dibawah A 14 Kaedah-kaedah Mahkamah Tinggi 1980 atas alasan bahawa ia bukanlah satu kes yang jelas, yang kemudiannya membawa kepada rayuan yang berjaya di hadapan hakim dalam kamar. Akan tetapi, hakim Mahkamah Tinggi telah membuat satu

perintah, yang tidak memuaskan hati plaintif yang berjaya kerana di dalamnya mengandungi beberapa terma bersyarat.

Diputuskan, membenarkan rayuan dengan kos di mahkamah ini dan di Mahkamah Tinggi:

(1) Isu 'bayar apabila dibayar' sebagai isu yang perlu dibicarakan adalah bukan-pemula kerana terdapat keterangan yang mencukupi dalam keadaan kes ini, untuk mengesahkan keperluan tersebut. Mengikut bahasa yang digunakan dalam peruntukan-peruntukan kontrak utama dan subkontrak, dibaca bersama dengan klausa 27(a)(vii), mahkamah menafsirkan klausa tersebut sebagai semata-mata satu peruntukan yang mengenakan satu had masa untuk bayaran, iaitu 14 hari. Tiada peruntukan yang nyata dalam klausa tersebut yang mengenakan sebarang halangan ke atas hak-hak plaintif untuk meneruskan tuntutannya terhadap defendan (lihat perenggan 15).

(2) Oleh kerana dinyatakan dengan jelas dalam klausa 27(a)(vii) bahawa plaintif dinafikan haknya dari meneruskan tuntutannya dalam bentuk ini, tindakan tersebut adalah betul dari segi prosedur (lihat perenggan 16).

(3) Kes ini adalah sangat jelas dan mudah di mana terma-terma utama kontrak bertulis tersebut telah dipersetujui oleh kedua-dua pihak dan sejarah pembayaran menunjukkan bahawa pihak-pihak bersetuju dengan cara pembayaran. Sebaliknya, disebabkan tiada halangan, plaintif tidak disekat dari meneruskan dengan tuntutan tersebut (lihat perenggan 17).]

Notes

For cases on mode of payment, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) para 2429.

For cases on order made by court, see 2(2) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 4186–4194.

Cases referred to

Alloy Automotive Sdn Bhd v Perusahaan Ironfield Sdn Bhd [1986] 1 MLJ 382 (refd)

Durabella Ltd v J Jarvis & Sons Ltd 83 Con LR 145 (refd)

Malayan Insurance (M) Sdn Bhd v Asia Hotel Sdn Bhd [1987] 2 MLJ 183 (refd)

Royden (M) Sdn Bhd v Syarikat Pembinaan Yeoh Tiong Lay Sdn Bhd [1992] 1 MLJ 33 (distd)

Smith & Smith Glass Ltd v Winstone Architectural Cladding Systems Ltd [1992] 2 NZLR 473 (refd)

Legislation referred to
Rules of the High Court 1980 O 14

Appeal from: Civil Suit No S1(S7)–22–343 of 2001 (High Court, Kuala Lumpur)

Lim Chong Fong (Marion Qua with him) (Azman Davidson & Co) for the appellant.
T Kuhendran (Khairiyah Yaman with him) (Zul Rafique & Partners) for the respondent.

Suriyadi JCA (delivering judgment of the court):

[1] On 26 March 2007, the panel had allowed the appeal filed by the appellant plaintiff ('the plaintiff') with costs at the Court of Appeal level and below. This was a matter pursuant to O 14 of the Rules of the High Court 1980 which was initially heard by the senior assistant registrar. The latter had refused the application, on the premise that it was not such a straight forward case, leading subsequently to a successful appeal being filed before the judge in chambers. Regretfully the High Court judge had made an order, which had dissatisfied the successful plaintiff, in that it contained conditional terms within it.

[2] To appreciate the reasons why we allowed this appeal, by necessity, we need to lay down some of the salient facts. The plaintiff was a subcontractor whilst the respondent defendant ('the defendant') the main contractor. The latter was appointed by Yetcome Investment, hereinafter referred to as the employer, to install lifts in respect of the Menara Landmark Johor Bahru Project. The plaintiff then had dutifully carried out its part of the bargain. In relation to this case, founded on interim certificates numbered 332 (dated 15 July 1998), 333 (dated 16 August 1998), 343 (dated 25 January 2000) and 344 (dated 19 December 2000) as certified by the project architect, were promptly partially paid except a balance sum of RM1,219,104. The balance unpaid sum came from certificates 332, 333 and 343.

[3] In relation to any payment, the plaintiff had submitted that the contractor shall apply for the architect's certificates and payments made from those certificates, which inevitably represent the total value of work done by the plaintiff, to be paid forthwith within 14 days. According to the plaintiff, this term was pursuant to cl 11(b) of the subcontract agreement and it reads:

(b) within fourteen days of the receipt by the Contractor of any certificate or duplicate copy thereof from the Architect the Contractor shall notify

and pay to the Sub-Contractor the total value certified therein in respect of the Sub Contract Works and in respect of any authorized variations thereof and in respect of any amounts ascertained under cl 8(c) hereof less:

(i) retention Money, that is to say the proportion attributable to the Sub Contract Works of the amount retained by the Employer in accordance with the Main Contract; and

(ii) the amounts previously paid.

[4] The defendant read their contractual relationship differently. Its defence was simple in that apart from the subcontract, the main contract with the employer was also incorporated in the contractual relationship between them. It makes commercial sense for a main contractor to incorporate in subcontracts condition precedents, in relation to its responsibility to pay the subcontractor, in that payment is made only after payments have been received from the employer. How can the contractor not be concerned when the architect's certificate is conclusive as to the date and amount of payment? On the other hand, subcontractors too are not without strength. Backed by their respective strength, parties will thereafter conclude their discussions, with their intentions being crystallised into written agreements.

[5] As affirmed in its defence, since the commencement of the project in 1996, it was mutually agreed and understood that payments to the plaintiff would be made after the defendant had received payments from the employer. The defendant submitted that the format of payment must be as that provided for in cl 27(a)(vii) of the main contract, read together with sub-cl 2 of cl 19 of the Nominated Sub-Contractors (Special Condition of the said Subcontract). Clause 27(a)(vii) reads:

That payment in respect of any work, materials or goods comprised in the sub-contract shall be made within 14 days after receipt by the Contractor of payment from the Employer against the architect's certificate under clause 30 of these Conditions which states as due in amount calculated by including the total value of such work, materials or goods, and shall when due be subject to the retention by the Contractor of the sums mentioned in sub-paragraph (viii) of para (a) of this Condition.

[6] As such, in the event payments were not received from the employer, the defendant would not be obliged to make payment to the plaintiff. In other words, the subcontract had proceeded on a 'pay when paid' basis.

[7] The plaintiff had alleged that the denial of the express provision of cl 11(b) of the subcontract was repugnant to or inconsistent with their

agreement. In support of that argument the case of *Royden (M) Sdn Bhd v Syarikat Pembinaan Yeoh Tiong Lay Sdn Bhd* [1992] 1 MLJ 33 was referred to. In this case, the defendant was employed by Cosmopleks Sdn Bhd ('the employer') as the main contractor for the construction of a project, Raintree Terrace, comprising 12 units of luxury condominium apartments at Jalan Wickham, Kuala Lumpur ('the project). By two subcontract agreements entered between the plaintiff and the defendant, the latter appointed the former as a subcontractor to supply and install air-conditioning and ventilation systems for the project, and to supply and install lift services for the project. The plaintiff had alleged that the defendant had failed or refused to pay certain progress payments, notwithstanding that such payments were duly certified by the authorised architect of the project, hence the institution of the civil suit on 11 February 1987. The plaintiff made an application for summary judgment which was heard by the senior assistant registrar on 7 November 1988 and final judgment was directed to be entered against the defendant. On appeal, the defendant raised two main issues, with the following being relevant for the current appeal: The defendant had alleged that it was not liable under cl 27(a)(vii) of the main contract, entered between the defendant and the employer, read with the letter of the defendant confirming the appointment of the plaintiff as its subcontractor, and certain clauses in the subcontract to pay the amounts certified by the payment certificates 14, 18 and 20. The excuse was that it had yet to be paid by the employer. Clause 27(a)(vii) reads:

> That payment in respect of any work, materials, or goods comprised in the sub-contract shall be made within 14 days after the receipt by the contractor from the employer of the amounts stated in any architect's certificate under cl 30 of these conditions which includes an amount due to the nominated subcontractor under the subcontract.

[8] Lim Beng Choon J after undertaking a fact finding exercise had found that cl 27(a)(vii) was not expressly stated in the two subcontracts. He found no privity of contract existing between the employer and the subcontractor, and reading the subcontract as a whole, it could not be said that cl 27(a)(vii) of the main contract had been incorporated into and formed part of the subcontract. The learned judge further opined that to incorporate cl 27(a)(vii) of the main contract into the subcontract would be repugnant to or inconsistent with the express provisions of cl 11(b) of the subcontract which clearly required the main contractor to inform and pay the subcontractor within 14 days upon receipt of the payment certificate issued by the architect. He accordingly dismissed the appeal.

[9] To counter this argument the defendant had referred to the subcontract provisions and we reproduce the relevant ones beginning with provision 1. It reads:

> These Special Conditions of Sub-Contract are to be read in conjunction with the General Conditions of Sub-Contract which shall be the 'Standard Form of Sub-Contract 1970 Edition' for use where the Sub-Contractor is nominated under the 'Agreement and Schedule of Conditions of Building Contract for use in Malaysia, Private Edition (With Quantities) 1969 Edition' issued under the sanction of the Pertubuhan Arkitek Malaysia and the Institution of Surveyors (Federation of Malaysia). Wherever these Special Conditions vary from the General Conditions the terms of the Special Conditions shall take precedence.

[10] The defendant had further advanced the argument that cl 27 had specifically been referred to in the subcontract unlike the position in *Royden (M) Sdn Bhd v Syarikat Pembinaan Yeoh Tiong Lay Sdn Bhd.* At SCC-19(6) the special conditions of subcontract read:

> (6) It is expressly agreed that the words 'within fourteen days of receiving payment from the Employer against the Architect's certificate' shall be added after the words 'the amount so certified' in line five of sub-clause 27(e) of the Conditions.

[11] Additionally there were the opening words of the subcontract which read:

> The Sub-Contractor shall be deemed to have notice of all the provisions of the Special Conditions of the Main Contract which are as follows …

[12] Apart from these provisions was the provision in the subcontract found at p 354 of the *rekod rayuan* which states too that, 'This Special Condition supersedes the General Conditions of the Subcontract wherever applicable'.

[13] Even though the legal arguments put forth by the defendant in relation to the construction of the main and subcontract documents were strong, the assertion that it had yet to be paid by the employer was suspect. On scrutiny of the facts, an erratic pattern of payment could be detected. Certificate 344 was a late comer but yet it had been fully paid up. Stranger still when we found that certificates 333 and 343 had been partially paid. If partial payments had been made could it not be implied that the employer had already made payments? If that were so why deny the plaintiff's rights of payment?

[14] Having sifted the submissions and the written agreements, we had decided that this issue of 'pay when paid' as being triable was a non-starter as there was sufficient evidence in the *circumstances of the case*, to confirm that requirement. Evidentially as ventilated by the defendant the plaintiff had acquiesced to the terms of 'pay when paid'. The 41 transactions from 1996

to 2000, as gauged from the documents, where the plaintiff was never paid within 14 days of receipt of the architect's certificates, and payment only made after the employer had paid the defendant, stood testimony of that acquiescence. The basis of the above "pay when paid" from which acquiescence flowed was the above mentioned cl 27(a)(vii). It was our view that the facts of this case were distinguishable to that of *Royden (M) Sdn Bhd v Syarikat Pembenaan* in that cl 27(a)(vii) of the main contract here had been incorporated into the subcontract. We were of the view that there was nothing triable or fearsome about this clause or its effect.

[15] By the very language alluded to in the relevant provisions of the current main contract and subcontract, read together with cl 27(a)(vii), we had construed the latter as a mere provision imposing a time limit for payment. We found no express provision mounted into it which imposed any restriction over the rights of the plaintiff to pursue its claim against the defendant. Master Towle in *Smith & Smith Glass Ltd v Winstone Architectural Cladding Systems Ltd* [1992] 2 NZLR 473 had occasion to state:

> While I accept that in certain cases it may be possible for persons contracting with each other in relation to a major building contract to include in their agreement clear and unambiguous conditions which have to be fulfilled before a subcontractor has the right to be paid, any such agreement would have to make it clear beyond doubt that the arrangement was to be conditional and not to be merely governing the time for payment. I believe that the *contra proferentem* principle would apply to such clause and that he who seeks to rely upon such a clause to show that there was a condition precedent before liability to pay arose at all should show that the clause relied upon contain no ambiguity.

[16] It was our view that, since it was not unambiguously expressed in cl 27(a)(vii) that the plaintiff was to be denied its rights from pursuing the claim in the current format, this action was procedurally correct. We now discuss the merit of the appeal.

[17] From the above arguments and despite the production of a substantial amount of documents, we were of the view that the case was straightforward and simple. We were satisfied, not unlike the High Court judge that the salient terms of the written contract had been agreed upon by both parties. The history of payments showed that parties had acceded to the mode of payment. On the other hand, we disagreed that this 'pay when paid' clause disallowed the plaintiff from pursuing this claim, on account of there being no bar preventing it. We also found, as the High Court judge did that there was no dispute as to the quantum, and todate the sum claimed still remained unpaid.

[18] We disagreed with the High Court order only on the aspect of the summary judgment being granted subject to certain payment terms. Even the defendant had conceded that 'the order of the learned High Court judge was not quite proper'. (To reiterate, we were of the view that although the amount claimed by the plaintiff was granted by the High Court, the specific prerequisite that payment be made enforceable only after the defendant had received payment from the above said employer, should not have been so ordered).

[19] The principles applied in a summary judgment proceedings is clearly illustrated in the case of *Alloy Automotive Sdn Bhd v Perusahaan Ironfield Sdn Bhd* [1986] 1 MLJ 382 (SC), where the Supreme Court had stated (at p 390) that:

> Where all the issues are clear, summary judgment should be given. An appellant ought not to be shut out from defending unless it is very clear that he has no case in the action. A complete defence need not be shown. The defence setup need only show that there is a triable issue or question or that for some reason there ought to be a trial.

[20] Similar principles were further illustrated in the case of *Malayan Insurance (M) Sdn Bhd v Asia Hotel Sdn Bhd* [1987] 2 MLJ 183 (SC), where the Supreme Court had held as follows:

> ... the underlying philosophy in the O 14 provision is to prevent a respondent clearly entitled to the money from being delayed his judgment where there is no fairly arguable defence to the claim. The provision should only be applied to cases where there is no reasonable doubt that the respondent is entitled to judgment. Order 14 is not intended to shut out an appellant. The jurisdiction should only be exercised in very clear cases.

[21] It was obvious here that there was no substantial question left to be tried, be they dispute of facts or law, which could deny the plaintiff of its right to sue for a judgment sum. With nothing left triable we had allowed the appeal as prayed for in prayer 1 of the summons in chambers. The plaintiff had wanted only final judgment for the sum of RM1,219,104 minus the unwarranted terms.

[22] Whether the order would be enforced or not subsequently was of no consequence to us. Needless to say, on this issue of enforceability, it was not for the court to lay down unnecessary terms, let alone the plaintiff never sought any direction of 'pay when paid'. Surely any specific judicial direction in the order could unwittingly deprive the plaintiff of any statutory or common law protection, and prevent the eventual recovery of the balance sum from the defendant, on account of the terms. Simply put, despite being

A faultless but pinned down by such inhibitive terms, the plaintiff's *chances* of recovering the balance by other alternative routes would face undue pressure and challenges. The fact that there was no cross-appeal on the judgment sum by the defendant speaks volumes of its assumed safe position, unwittingly accorded to it. Having said that, and in obiter, no court of law would
B condone any act, activity or inactivity or unholy collusions deliberately set up to defeat the plaintiff's claim (*Durabella Ltd v J Jarvis & Sons Ltd* 83 Con LR 145)

C **[23]** To wind up this judgment, based on the above reasons, we had unanimously allowed the appeal with costs here and below. Order in terms was granted as per prayer 1 of the summons in chambers dated 27 August 2001.

Appeal allowed with costs here and below.

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Reported by Sally Kee

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